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LAWYERS

Workers Rehabilitation & Compensation Tribunal

CASE COMMENTARIES • 1 October 2020

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Issues with Section 81A referrals since Bradshaw

These two recent decisions of the Tribunal deal specifically with what it now considers is required for the employer to discharge its onus of proof on disputes of claims in accordance with s81A based on medical causation grounds following the decisions of Brett J in *Bradshaw v Tasmania Networks Pty Ltd* [2019] TASSC 41 and the Full Court in *Bradshaw v Tasmania Networks Pty Ltd* [2020] TASFC.

Following the *Bradshaw* decisions, it is clear that the Tribunal now takes a strict view as to the medical evidence required for a reasonably arguable case determination and that employers must satisfy the Tribunal that a worker does not have an entitlement through any of the three pathways to entitlement under the Act.

Employers must now present evidence that explicitly satisfies the Tribunal that:

1. The worker has not suffered an injury arising out of, or in the course of, their employment as required by s25(1)(a); and
2. The worker has not suffered an injury, which is a disease and to which their employment contributed to a substantial degree, within the meaning of section 3(2A) as required by s25(1)(b); and
3. The worker has not suffered an injury which is a recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease where the employment was the major or most significant contributing factor to that recurrence, aggravation, acceleration, exacerbation or deterioration.

This interpretation is based on Brett J's comments in *Bradshaw* at first instance that "*there is no reason why the claim should be restricted to one limb only, and such a restriction would be contrary to the scheme of the Act*".

We take the view that the Tribunal has unduly elevated his Honour's comments from the particular factual matrix in Mr Bradshaw's case to a statement of wide principle that ignores the fundamental test in a s81A case.

The State of Tasmania (Department of Health) v R. [2020] TASWRCT 29 (28 August 2020)

Link: Click Here

1 This decision of Commissioner Wilkins involves a claim for RSI which was disputed based on a report of Dr David Ruttenberg in which he said, amongst other things, that he "*could not state that his employment was the cause of these symptoms, noting that pain symptoms are common in working and recreational environments*" and that "*His symptom complex does not appear to be an acceleration, exacerbation or recurrence of a pre-existing symptom complex*".

2 Dr Ruttenberg went onto say "*At this stage, there is a temporal association with him utilising a mouse and performing administrative-based tasks. I cannot confirm however, that he has suffered a work-caused physical injury. Essentially, he has pain symptoms associated with mouse clicking.*"

3 In this decision Commissioner Wilkins said that she accepted, based on Dr

Ruttenberg's evidence, that there was no frank injury and that it was arguable that there was no disease for the purposes of s25(1)(b), however she said that "*the grounds for dispute did not address the third 'pathway to liability' – that is, whether the worker had suffered an injury that was a recurrence, aggravation, acceleration, exacerbation or deterioration of a pre-existing injury or disease, where the employment was the major or most significant contributing factor to that recurrence, aggravation, acceleration, exacerbation or deterioration*".

4 Commissioner Wilkins noted that Dr Ruttenberg failed to refer to either "*aggravation*" or "*deterioration*". She was concerned that Dr Ruttenberg had taken a history that:

"*Earlier this year, following a move to a role that required much more computer work and more intense mouse work, the worker's symptoms became worse. According to Dr Ruttenberg, the worsening of those symptoms was associated with the worker using a mouse as he performs his work duties. As Dr Ruttenberg observes in his answer to Q. 13, "There is a temporal association with him utilising a mouse and performing administrative based tasks... Essentially, he has pain symptoms associated with mouse clicking", but then failed to specifically address whether this was an aggravation*".

5 Commissioner Wilkins said that in the absence of Dr Ruttenberg providing a specific comment that the mousing activities wasn't an aggravation, the employer hadn't discharged its onus. As a result, the employer's s81A referral was dismissed.

6 The takeaway is that employers/insurers need to be really careful in situations where the factual history suggests that there might be recurrence, aggravation, acceleration, exacerbation or deterioration but the medical evidence doesn't specifically address whether it amounted to a recurrence, aggravation, acceleration, exacerbation or deterioration of a pre-existing injury or disease where the employment was the major or most significant contributing factor to that recurrence, aggravation, acceleration, exacerbation or deterioration.

7 In our view, however, the evidence that the employer presented was that the injury was one which was a disease. Once that was accepted as the employer's case the issue as to whether it might constitute an aggravation etc. was irrelevant because once the Tribunal accepted that the injury was one which was a disease it could not consider s25(1)(a) (which only applies to injuries which are not diseases). If it accepted this and then accepted Dr Ruttenberg's view about causation it would be bound to find a dispute.

8 The Tribunal, with respect, confused the issue arising from *Bradshaw* where the employer sought before the Tribunal only to address an "injury" claim that appeared to be put by the worker in that case. The Court decided that the worker was not limited to that route but could address an alternative route via s25(1)(b).

9 In our view the Tribunal in this case however, was not assisted by the lack of precision in the s81A reference which quite unnecessarily opened the door for the argument as to the existence of a s25(1)(a) route.

1 This decision of Chief Commissioner Clues also involved a dispute based on a report from Dr Ruttenberg.

2 In this case, we have another situation in which there was arguably a possible recurrence, aggravation, acceleration, exacerbation or deterioration. Dr Ruttenberg stated clearly that the worker "*has an idiopathic adhesive capsulitis affecting the right dominant shoulder*". In response to a question about a recurrence, aggravation, acceleration, exacerbation or deterioration, he said it wasn't applicable.

3 Ordinarily we would expect that would be more than adequate evidence to support a dispute of the claim on causation grounds, however, the Chief Commissioner was concerned that Dr Ruttenberg hadn't addressed the question about a recurrence, aggravation, acceleration, exacerbation or deterioration and noted that "*the worker says that she experienced pain immediately after work on 16 April 2020. That pain developed and subsequently resulted in the worker becoming incapacitated for work from 8 May 2020. Based on this history, the effect of the worker's underlying condition, that Dr Ruttenberg diagnoses as adhesive capsulitis, was increased or intensified after she cleaned theatres at work on 16 April 2020*".

4 The Chief Commissioner concluded that "*it follows from this that the worker's incapacity which occurred on 8 May 2020 resulted from her experiencing symptoms on that day after having cleaned six theatres at work on 16 April 2020. Those symptoms constituted an aggravation of exacerbation of the worker's underlying adhesive capsulitis. An aggravated non-work-related pre-existing condition can become an injury pursuant to s25(1) and the extended definition*".

5 The Chief Commissioner said the critical issue was whether there was the requisite causal relationship between the *aggravation* and the employment. She was critical of Dr Ruttenberg and said the question as to the cause of the *aggravation* was applicable given the history given by the worker.

6 However, she reached the conclusion that it could be inferred from his other comments that "*it is implicit in Dr Ruttenberg's opinion that the onset of symptoms on 16 April 2020 was spontaneous or due to the natural progression of the worker's underlying condition*".

7 On that basis she determined that there was a reasonably arguable case.

8 Again, the message for insurers and employers is that they need to be very careful about the medical evidence presented on s81A applications for disputes of claims on medical causation grounds.

9 In particular, it is necessary to address each of the three pathways to an entitlement to compensation in the medical evidence presented to the Tribunal.

10 Like the previous decision, we have some concerns with the Tribunal determination. The Chief Commissioner seems to have confused a "condition" with a "disease". The precise words of the Act need to be considered which requires an aggravation etc. of a pre-existing disease, not a pre-existing condition. The term disease has a particular meaning under the Act. The analysis by the Tribunal has the potential, if accepted, to rob the primary definition of disease of its meaning and to focus only on the proximate events at the time of development of incapacity and not to examine the whole of the developmental factors in a disease process.

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